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In the Supreme Court of the United States

OCTOBER TERM, 1992

DAVID W. MURRAY, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATES OF HIS MINOR CHILDREN, DESAREA MURRAY, DAVID W. MURRAY, JR., AND DARRYL SCOTT MURRAY, AND SALLY W. MURRAY

Petitioners

versus

ANTHONY J. BERTUCCI CONSTRUCTION CO., INC., THE M/V BARBARA ANN, AND PACIFIC EMPLOYERS INSURANCE COMPANY

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

QUESTION NUMBER 1

WHETHER THE COURT OF APPEALS CORRECTLY DETERMINED THAT *MILES V. APEX MARINE CORP.* ___ U.S. ___, 111 S.CT. 317 (1990) APPLIES WITH EQUAL FORCE TO FATAL AND NONFATAL INJURIES THUS RENDERING *AMERICAN EXPORT LINES V. ALVEZ,* 446 U.S. 274 (1980) INAPPLICABLE TO JONES ACT SEAMEN.

QUESTION NUMBER 2

WHETHER THE COURT OF APPEALS CORRECTLY DETERMINED THAT *MILES* FORECLOSES THE RECOGNITION OF A NEW CLASS OF LOSS OF SOCIETY BENEFICIARIES.

QUESTION NUMBER 3

WHETHER PETITIONERS HAVE DEMONSTRATED SPECIAL AND IMPORTANT REASONS WHICH WOULD JUSTIFY DISCRETIONARY REVIEW UNDER SUPREME COURT RULE 10.

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STATUTES APPLICABLE TO THE CASE

46 U.S.C. § 688(a):

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right to trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

46 U.S.C. § 761:

> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

STATUTES APPLICABLE TO THE CASE (continued)

46 U.S.C. § 762:

> The recovery in such suit shall be fair and just compensation for the pecuniary loss sustained by the person for whole benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

STATEMENT OF THE CASE

Petitioner David W. Murray brought suit under the Jones Act, 46 U.S.C. §688, *et. seq.* and the general maritime law, Art. III, Sec. 2, United States Constitution against the tug M/V BARBARA ANN, her owner, Anthony J. Bertucci Construction Company ("Bertucci"), and Bertucci's protection and indemnity underwriters, Pacific Employer's Insurance Company, alleging that he sustained injuries in the course of his employment aboard the vessel. Murray is a licensed seaman who was employed by Bertucci as a deckhand aboard the M/V BARBARA ANN, then engaged in shifting rock barges in connection with revetment work which Bertucci was performing for the United States Army Corps of Engineers near the mouth of the Mississippi River in Louisiana territorial waters. Murray was injured when he slipped and fell on unstable rock located on the starboard bow of one of the rock barges.

Murray was treated for an injury to his back which culminated in a relatively routine surgical procedure — decompressive laminectomy and spinal fusion. Murray's rehabilitation did not progress as expected, due in part to his lackluster participation in prescribed physical therapy, and he now requires numerous personal and therapeutic services, including psychiatric treatment.

By the time of the trial, Murray's suit had been amended to include loss of society claims on behalf of both his wife and his three children. Mrs. Murray's emotional testimony at trial alluded to alleged dramatic changes in lifestyle which followed Murray's surgery and focused in large part upon the various nursing and other services which she said she was required to perform.

The jury awarded Murray damages totalling $662,800 which included $62,800 for future medical expenses. [Appendix at A 4.] Bertucci did not appeal this award. The jury also awarded Mrs. Murray $175,000 for loss of services, comfort, society and attention — by twofold the largest such award arising from nonfatal injuries reported in Louisiana caselaw. [Appendix at A 5.] In addition, the jury awarded each of Murray's three minor children $37,500 for loss of services, society, comfort and attention. (The District Court had previously granted Bertucci's motion to strike the children's loss of society claims on the basis of existing Fifth and Third Circuit precedent, but submitted the claims to the jury in the event petitioners successfully appealed its ruling).

Bertucci filed its motion for new trial or, alternatively, for remittitur, on November 19, 1990 based upon the excessiveness of Mrs. Murray's damages. [Appendix at A 8-23.] The motion was denied on December 11, 1990. [Appendix at A 24-28.] Bertucci thereafter filed its notice of appeal, on January 9, 1991, [Appendix at A 29-30], and its statement of issues on appeal, on January 15, 1991, which included (1) whether the $175,000 loss of consortium award was excessive, and (2) whether the trial court committed error in denying the motion for new trial or, alternatively remittitur. [Appendix at A 31-32.] Bertucci subsequently amended its statement of issues to include whether this Court's decision in *Miles v. Apex Marine Corp.*, ___ U.S. ___, 111 S. Ct. 317 (1990) implicitly overruled the Fifth Circuit precedent which had established availability of loss of society damages to the spouse of a Jones Act seaman in the first instance. [Appendix at A 33-34.]

Following oral argument, the Fifth Circuit issued its opinion reversing the District Court's award to Mrs. Murray for loss of society damages based on this Court's decision in *Miles* and affirming the District Court's ruling bar-

ring the children's loss of society claims on the same basis. [Appendix at A 35-41.]

SUMMARY OF ARGUMENT

A. The Fifth Circuit Correctly Held That *Miles* Applies With Equal Force to Fatal and Non-Fatal Injuries.

The Fifth Circuit in *Cruz v. Hendy International Co.*, 638 F.2d 719 (5th Cir. 1981) extended the rationale of *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974) and *American Export Lines v. Alvez*, 446 U.S. 274 (1980), and created a cause of action for a spouse's loss of a non-fatally injured Jones Act seaman's society.

Miles v. Apex Marine Corp., ___ U.S. ___, 111 S. Ct. 317 (1990) expressly limited *Gaudet* (and by implication *Alvez*) to its facts based upon the premise that statutory maritime law expresses Congress' considered judgment on the appropriate damages available and that this expression of congressional intent necessarily delineates those damages available under the general maritime law, likewise limiting these to pecuniary loss.

The argument now presented by Petitioner that *Miles*' applicability should be limited to its facts — fatal injury — belies that the genesis of loss of society emerged first in the context of fatal injury and was only later extended to the non-fatal sphere, and completely disregards *Miles*' lesson that the principles of uniformity and deference to Congressional wisdom are overriding. Moreover, this Court concluded in *Miles* that it is the *Jones Act* which by implication limits recovery under the general maritime law to pecuniary loss. The Jones Act applies with equal force to fatal and non-fatal injuries. The distinction

therefore, for present purposes, between fatal and non-fatal injury, is one without a difference.

B. The Fifth Circuit Correctly Refused to Recognize A New Class of Loss of Society Beneficiaries.

Miles' reasoning applies *a fortiori* to the Murray children's claims for loss of society. Said to be inherently more speculative, claims for a child's loss of society under the general maritime law have been rejected by both circuit courts to address the issue. *Madore v. Ingram*, 732 F.2d 475 (5th Cir. 1984); *DeLoach v. Companhia de Navegacao Lloyd Brasileiro*, 782 F.2d 438 (3d Cir. 1986). The Louisiana legislature's decision to depart from the majority of states and amend its Civil Code to provide for this cause of action in no way compels or authorizes such a drastic departure from the Congressional decision to say "This much and no more." *Miles*, ____ U.S. at ____, 111 S. Ct. at 321.

C. Certiorari is Not Warranted Because No Special and Important Reasons Can be Shown For This Court to Grant Discretionary Review.

Petitioners have not and cannot show "special and important reasons" which would warrant this Court exercising discretionary review. *Miles* has barely reached the district courts. The issue came before the Fifth Circuit so quickly in the present case because this appeal was pending when the decision in *Miles* was issued. There are therefore a myriad of related issues which should be thoroughly analyzed by the lower federal courts before this Court speaks again.

ARGUMENT

The availability of loss of society damages under the general maritime law is of very recent origin. In 1976 the Fifth Circuit followed the Second Circuit's lead of over a decade before and concluded that the general maritime law *did not* permit loss of society damages for the spouse of a non-fatally injured Jones Act seaman. *Christofferson v. Halliburton Company*, 534 F.2d 1147, 1149 (5th Cir. 1976), relying in part upon *Igneri v. Cie. de Transports Oceaniques*, 323 F.2d 257 (2d Cir. 1963), *cert. denied*, 376 U.S. 949 (1964).

Only five years after deciding *Christofferson* the Fifth Circuit reversed itself in *Cruz v. Hendy International Co.*, 638 F.2d 719 (5th Cir. 1978). Both the *Christofferson* and *Cruz* cases involved non-fatally injured Jones Act seamen.[1] The only significant difference between *Christofferson* and *Cruz* was the intervention of this Court's decision in *American Export Lines v. Alvez*, 446 U.S. 274 (1980).

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[1] In *Christofferson*, the demand appears to have been for loss of "consortium" damages, although the court discusses *Gaudet* and loss of *society*, and seems to treat the two concepts interchangeably. *Christofferson*, 534 F.2d at 1150. In *Cruz*, however, the court distinguishes between loss of society and loss of consortium, expressly restricting its holding to allow only the former:

> The claimant-spouse may not recover the value of home nursing services for that is an element of damages recoverable by the injured spouse. Loss of the services that would have been provided to the marital partnership are also excluded for they are likewise embraced in the physically injured spouse's claims.

* * *

Alvez itself was indistinguishable from the *Igneri* decision, relied upon in *Christofferson*, save for the intervening decisions first in *Moragne v. States Marine Lines*, 398 U.S. 375 (1970), and then in *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974). *Alvez*, a further extension of *Gaudet*, subtly but inarguably eased *Igneri* out of existence, first tracking the evolution of the general maritime law during the intervening two decades and then concluding that *Igneri* was not in line with these developments:

> The *Igneri* opinion was carefully constructed within the framework of then-applicable doctrines governing maritime remedies. At the time, there was no clear authority sustaining a general maritime law right of recovery for loss of society.
>
> * * *
>
> Subsequent developments, however, have altered the legal setting within which we confront a claim for loss of society due to personal injury.
>
> * * *
>
> *Gaudet* held, *inter alia*, that the maritime wrongful death remedy created by *Moragne* encompassed the recovery of damages for loss of society by a decedent's widow. So, it is no longer correct to assume — as did *Igneri* — that the warranty of seaworthiness affords no relief to the spouse of a longshoreman.

Footnote 1 continued.

> [L]oss of support provided by the injured spouse is not recoverable by the claimant spouse in the loss of society action .... It necessarily follows that the spousal claim we recognize is not for loss of consortium.

Cruz, 638 F.2d at 726-27.

Alvez, 446 U.S. at 279-80 (citations omitted).

In extending the rationale of *Gaudet* beyond the sphere of fatal injuries, *Alvez* specifically addressed the distinction which petitioner attempts to draw here between fatal and non-fatal injuries and dismissed it as "logically irrelevant" without serious discussion:

> To be sure, *Gaudet* upheld a claim for loss of society in the context of a wrongful death action. But general federal maritime law is a source of relief for a longshoreman's personal injury, just as it is a source of remedy for wrongful death. Within this single body of judge-formulated law, there is no apparent reason to differentiate between fatal and non-fatal injuries in authorizing the recovery of damages for loss of society.

Alvez, 446 U.S. at 281 (citations omitted).

The Fifth Circuit in *Christofferson* had inferred a limitation of *Gaudet's* applicability to fatal injuries, but if any questions as to *Christofferson's* continued vitality existed after a reading of this passage from *Alvez*, quoted above, the Court directly answered it in a footnote:

> In *Christofferson v. Halliburton Co.*, 534 F.2d at 1150, the Court of Appeals for the Fifth Circuit inferred from that passage an intention to limit *Gaudet* to the wrongful-death context. But no such limitation is implicit. As a matter of logic, *Gaudet's* statement that double liability is precluded in wrongful-death cases is not equivalent to the proposition that *only* wrongful-death cases preclude double liability. Moreover, the *Gaudet* opinion itself noted that damages may be assessed for loss of society in personal injury cases.

Alvez, 446 U.S. at 281 n.8.

So the year following *Alvez*, when *Cruz* came to the Fifth Circuit, there was little question as to how the case would be resolved. Whereas *Alvez* involved a longshoreman while *Cruz* involved a Jones Act seaman, *Alvez* had considered *and rejected* the textualist argument, ultimately embraced in *Miles*, that the Jones Act implicitly constrains the damages available under the judge-made general maritime law.[2] *Alvez* in fact appears to have attributed the pecuniary damage limitation implicit in the Jones Act to congressional oversight and, in any case, gave it *de minimis* weight in defining the scope of available damages under general maritime law:

> The Jones Act itself was not the product of careful drafting or attentive legislative review... [A]ssuming that the statute bars damages for loss of society, it does so solely by virtue of judicial interpretation of the Federal Employees Liability Act, 45 U.S.C. § 51, *et seq.*, which was incorporated into the Jones Act. Thus, a remedial omission in the Jones Act is not evidence of considered congressional policy-making that should command our adherence in analogous contexts.

Alvez, 446 U.S. at 283-84.[3]

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[2] *Alvez*, 446 U.S. at 281-284.

[3] The Jones Act, 46 U.S.C. § 688, made applicable to seamen's claims certain substantive provisions of the Federal Employer's Liability Act ("FELA"), 45 U.S.C. §§ 51-59. Prior to the enactment of the Jones Act this Court had concluded that the damages available under the FELA did not include loss of society. *New York Central & Hudson River Railroad Co. v. Tonselito*, 244 U.S. 360 (1917). *Miles* recognized that Congress is presumed to be aware of existing law when it legislates and that by "[i]ncorporating FELA unaltered into the Jones Act, Congress must have intended to incorporate the pecuniary limitation on damages as well." *Miles*, ___ U.S. ___, 111 S. Ct. at 315 (cite omitted).

More importantly, *Alvez* was decided in 1980 and would have been an anomaly were it intended to be limited to longshoremen. Alvez's injuries occurred prior to the effective date of the 1972 amendments to the Longshoremen's and Harborworkers' Compensation Act. These amendments eliminated the warranty of seaworthiness to longshoremen by legislatively overruling *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946). Thus *Alvez* had no applicability to its own facts when this Court accepted the petition for certiorari. The Fifth Circuit recognized this and extended *Alvez* beyond its facts based in part upon its perception that a broader scope was intended.[4]

The *Cruz* court stated that it saw as little reason to distinguish "between the types of workers whose rights stem from" unseaworthiness *as to distinguish between fatal and non-fatal injuries*, concluding:

> [T]he general maritime law, a single and unitary body of jurisprudence, extends the same rights to all entitled to recover under it whether the injury occurs in territorial waters or on the high seas and...accordingly, the spouse of a person entitled to recover for unseaworthiness has a cause of action for loss of society whether the injured person was a member of a vessel crew or was for some other reason entitled to a seaworthy vessel.

Cruz, 638 F.2d at 724-25.

It thus becomes clear that the argument Petitioners now assert for *differentiating* between fatal and non-fatal injuries is disingenuous. The genesis of loss of society was in the context of fatal injury. *See Gaudet*, 414 U.S. 573. In-

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[4] *See Cruz*, 638 F.2d at 724 nn. 13,14.

deed, the very principles which warranted the extension of *Gaudet* beyond its facts (fatal injury to a longshoreman) to those at bar (non-fatal injury to a seaman) compel the conclusion that there is no logical reason to distinguish between fatal and non-fatal injuries:

> The vitality of the longshoreman is logically irrelevant once we have accepted the principle that injury suffered by a longshoreman's spouse from loss of society should be compensable, when proved. Nothing intrinsic to the *Gaudet* rule, therefore, should cabin its application to wrongful death.

Alvez, 446 U.S. at 281.[5]

Petitioners' efforts to now distinguish their loss of society cause of action from its wrongful-death roots in *Moragne* and *Gaudet* are superficial and circular. For example, Petitioners correctly argue that *Alvez* "declined the ...invitation to analogize a general maritime law remedy in a case involving a non-fatal injury to a statutory wrongful death remedy"[6] but conveniently overlook *Alvez's* criticism — indeed its reversal — of *Christofferson*. *Christofferson* was wrong *because* it inferred the distinction between fatal and non-fatal injury which Petitioners attempt to draw here. *Alvez*, 446 U.S. at 281 n. 8.

Petitioners' argument that the evolution of the wrongful-death cause of action in some way likens an

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[5] The irony of petitioner's argument becomes even more apparent when one considers that *Alvez* was a plurality opinion with Justice Powell, a dissenter in *Gaudet*, accepting *Gaudet* as *stare decisis* and concurring in *Alvez* because he saw "no rational basis for drawing a distinction between fatal and non-fatal injuries." *Alvez* 446 U.S. at 286.

[6] Petition For Writ of Certiorari at 9.

unseaworthiness claim which results in fatal injuries to DOHSA and Jones Act claims more so than an unseaworthiness claim which results in non-fatal injuries, forgets that the Jones Act applies equally to fatal and non-fatal injury. Throughout the discussion of DOHSA and the Jones Act, in fact, Petitioners mistakenly characterize the Jones Act as a "wrongful death remedy,"[7] in an apparent effort to distance Mr. Murray, a seaman, from its scope, when in fact he has recovered $662,800 for his injuries pursuant to its provisions.

Petitioners' attempts to minimize the significance of DOHSA in delimiting general maritime law damages are likewise circular. Quoting *Moragne* for the very proposition *affirmed* in *Miles* — *i.e.*, that DOHSA does not foreclose the availability of a general maritime law wrongful death cause of action[8] — Petitioners assert *Moragne* as authority for the argument that DOHSA evinces no expression of congressional judgment on the subject of available damages. Yet, *Miles* holds directly to the contrary, expressly approving *Moragne's* view that "federal admiralty law should be 'a system of law coextensive with and opera-

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[7] Petition For Writ of Certiorari at 10-11.

> Both DOHSA and the Jones Act were statutory efforts to fill the vacuum left by the absence of a wrongful death remedy at common law. Thus, this Court's decision in *Miles* to analogize the general maritime's [sic] wrongful death remedy to the statutory wrongful death remedy afforded by DOHSA *and the Jones Act* and thereby preclude loss of society damages is imminently reasonable given the historical context in which the general maritime wrongful death action was created.

Id. at 11 (emphasis ours).

[8] The first issue (of necessity) decided in *Miles* was whether *Moragne* applied beyond its facts (the death of a longshoreman). *Miles*, 111 S. Ct. at 323.

ting uniformly in, the whole country.' "[9] and concluding:

> We have described *Moragne* at length because it exemplifies the fundamental principles that guide our decision in this case. We no longer live in an era when seamen and their loved ones must look primarily to the courts as a source of substantive legal protection from injury and death; Congress and the States have legislated extensively in these areas. In this era, an admiralty court should look primarily to these legislative enactments for policy guidance.

Miles, 111 S. Ct. at 323.

Miles' emphasis on the importance of statutory law was foreshadowed in *Mobil Oil Corp. v. Higgenbotham*, 436 U.S. 618 (1978). *Higgenbotham* was the first decision to come face to face with the irreconcilable inconsistency between the Supreme Court's "policy determination" in *Gaudet* and Congress' policy decision expressed through statute.[10] Some lower courts had begun to conclude that the expanded general maritime law was meant to entirely supplant the lesser remedies available statutorily.[11]

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[9] *Moragne*, 378 U.S. at 402 quoted in *Miles*, 111 S. Ct. at 323.

[10] *Mobil Oil Corp. v. Higgenbotham*, 436 U.S. 618, 622-23 (1978).

> The *Gaudet* opinion was broadly written. It did not state that the place where death occurred had an influence on its analysis. *Gaudet* may be read, as it has been, to replace entirely the Death on the High Seas Act. Its holding, however, applies only to coastal waters. We therefore must now decide which measure of damage to apply in a death action arising on the high seas — the rule chosen by Congress in 1920 or the rule chosen by this Court in *Gaudet*.

[11] *See, e.g., Law v. Sea Drilling Corp.*, 523 F.2d 793 (5th Cir. 1975).

Higgenbotham reversed this trend, cautioning that statutory law should be the primary guide in refining the general maritime law "both because of the interest in uniformity and because Congress' considered judgment had great force in its own right."[12]

Higgenbotham did not overrule *Gaudet* but rather restricted its applicability to territorial waters, beginning the process which eventually culminated in *Miles*. *Miles* further restricted *Gaudet*, and for practical purposes has overruled it *sub silentio*, by limiting *Gaudet's* applicability to longshoremen. Longshoremen have not been owed a duty of seaworthiness, and thus have not been entitled to recovery under the general maritime law, since 1972.[13] The Court's choice to restrict *Gaudet* to its facts rather than reverse it outright was a deliberate one; *Miles* refused to similarly limit *Moragne*, which also involved a longshoreman, because to do so would mean that *Moragne* "would no longer have any applicability at all."[14]

The reason the Court chose to constrict *Gaudet* into obsolescence instead of reversing it seems clear. *Gaudet* was extended *beyond* the context of longshoremen by lower federal courts. It was unnecessary for *Miles* to expressly overrule *Gaudet* and *Alvez* because statute has done that; yet, by limiting these cases to their facts the clear message to the lower courts is that the winds have changed. Those lower court cases, like *Cruz*, which rely heavily upon the

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[12] *Higgenbotham*, 436 U.S. at 624. *Higgenbotham* involved fatal injuries to nonseamen on the high seas, thus only the Death on The High Seas Act, 46 U.S.C. § 761, and not the Jones Act, 46 U.S.C. § 688, was considered.

[13] *See* 33 U.S.C. § 905, providing the exclusive remedies available to longshoremen.

[14] *Miles*, 111 S. Ct. at 323.

concept that "the humane and liberal character of proceedings in admiralty"[15] and the historical "special solicitude"[16] to seamen exercised by the courts of admiralty compel an ever-expanding scope of general maritime law damages are now on the lee side of *Higgenbotham* and *Miles*, which counsel:

> We are not unmindful of these principles but they are insufficient in this case. We sail in occupied waters. Maritime tort law is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them.

Miles, 111 S. Ct. at 327.[17]

Finally, Petitioners' half-hearted argument that Louisiana Civil Code Article 2315.5 (allowing loss of society damages under state tort law) should be permitted to supplement federal maritime law is premised on a completely inapposite reading of *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*,[18] which simply holds that

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[15] *The Sea Gull*, 21 F. Cas. 909 (No. 12,578)(C.C.Md. 1865) cited in *Gaudet*, 414 U.S. at 583.

[16] *Moragne*, 398 U.S. at 387.

[17] *See also Higgenbotham*, 436 U.S. at 625. (When Congress "speak[s] directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless.").

[18] 348 U.S. 310 (1955). *Wilburn Boat* addresses the *sui generis* field of insurance regulation which Congress has expressly delegated to the states. See 15 U.S.C. § 1011 ("McCarran-Ferguson Insurance Regulation Act"). *Wilburn Boat* simply recognizes the importance of state regulation of insurance matters in the context of maritime insurance—a maritime contract. *Wilburn Boat*, 348 U.S. at 320-21. It is wholly inaplicable to the broader issue of state law supplementing the general maritime law.

state regulations governing insurance apply equally to marine insurance despite the fact that a policy of marine insurance is a "maritime contract." The rationale of *Wilburn Boat*, when extracted from the insurance context, is irreconcilable with *Miles*' emphasis on uniformity and has no place in maritime tort law.[19] Moreover, this argument is superfluous *unless Miles* has indeed so restricted Alvez as to implicitly overrule any extensions, such as *Cruz*. Otherwise, resort to state law is unnecessary.

B. The Fifth Circuit Correctly Refused to Recognize A New Class of Loss of Society Beneficiaries.

Petitioners' efforts to further extend *Alvez* to support a new class of loss of society beneficiaries — children — were properly rejected by the Fifth Circuit in view of *Miles*. Loss of society is non-pecuniary. *Miles* forecloses the availability of loss of society non-pecuniary damages before the analysis ever reaches the point at which the lower federal courts would be required to determine the proper scope of loss of society beneficiaries.

Even before *Miles*, the only two circuits to address the question had decided against the availability of children's loss of society damages. In *Madore v. Ingram Tank Ships, Inc.*, 732 F.2d 475 (5th Cir. 1984) the Fifth Circuit concluded:

> An overwhelming majority of the courts that have considered such a claim under state tort law have rejected it for various reasons. Some have relied on the argument that it is inherently

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[19] *See also Offshore Logistics v. Tallentire*, 477 U.S. 207 (1986) (holding that DOHSA does not permit supplementation of recoverable damages by state law).

> speculative to attempt to determine how much society the child has lost if his parent lives and can continue to furnish parential guidance.

Madore, 732 F.2d at 749.

The Third Circuit relied on similar reasoning in *DeLoach v. Companhia de Navegacao Lloyd Brasiliero*, 782 F.2d 432 (3d Cir. 1986). Both the Fifth and Third Circuits looked to developments in state tort law and concluded there was no support for further expanding loss of society beyond the spousal sphere.[20] *Miles* now suggests they should have looked no further than statutory maritime law.

C. Certiorari is Not Warranted Because No Special and Important Reasons Can be Shown.

Petitioners have shown no special circumstances which would warrant this Court's review. Supreme Court Rule 10 states:

> A petition for a writ of certiorari will be granted only when there are special and important reasons therefore.

The rule goes on to suggest that only an intercircuit,

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[20] *See also Miles*, ___ U.S. ___, 111 S. Ct. at 327, rejecting the argument that a "right of survival" action to recover future loss of income may be maintained pursuant to the Jones Act, noting that "[i]n only a few states can an estate recover in a survival action" and concluding "[t]his ... hardly constitutes the kind of 'wholesale' and 'unanimous' policy judgment that prompted the Court to create a new casue of action in *Moragne*," *Miles*, ___ U.S. ___, 111 S. Ct. at 327, *citing Moragne*, 398 U.S. at 388.

conflict or "far depart[ure]" from "accepted and usual...judicial proceedings" constitute such special circumstances that warrant discretionary review.

This case appears to be the first in which a circuit has had the opportunity to interpret *Miles*. In any event, there is no intercircuit conflict. Moreover, the district courts have not yet had the opportunity to fully analyze *Miles* through application.[21] For example, one aspect of *Miles* which should be more thoroughly analyzed by the lower courts before further consideration by this Court is its impact upon the availability of punitive damages, which are also non-pecuniary. Some district courts have extended *Miles* so as to preclude punitive damages.[22] The question of *Miles*' impact on the availability of punitive damages as well as the likelihood of other undiscovered ancillary issues militates in favor of further analysis among the lower courts before this Court considers these issues again.

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[21] Those which have applied *Miles* have rejected, almost uniformly, the fatal/non-fatal distinction Petitioners urge here. *See, e.g., Dunbar v. American Commercial Barge Lines Co.*, 771 F.Supp. 151 (M.D.La. 1991); *Melancon v. Petrostar Corp.*, 762 F.Supp. 1261 (W.D.La. 1991); *Fleming v. Zapata Gulf Marine Corp.*, 1991 A.M.C. 2201 (E.D.La. 1991); *Cater v. Placid Oil Co.*, 1992 A.M.C. 524 (E.D.La. 1991); *Hannon v. Waterman Steamship Corp.*, Docket No. 80-1175, 1991 WL 278996 (E.D.La. Dec. 20, 1991) (unreported); *Maxwell v. Best Workover*, Docket No. 91-0995, 1992 WL 6295 (E.D.La. Jan. 2, 1992) (unreported); *Vicknair v. Turner Well Services*, Docket No. 91-0623, 1991 WL 129816 (E.D.La. July 8, 1991) (unreported); *Skelton v. Penrod Drilling Corp.*, Docket No. 91-1456, 1991 WL 111915 (E.D.La. June 20, 1991) (unreported); *Wess v. Plaquemines Bunkers, Inc.*, Docket No. 91-1392, 1991 WL 111030 (E.D.La. June 7, 1991) (unreported); *Hornsby v. Zapata Gulf Marine Operators*, Docket No 90-2736, 1991 WL 87956 (E.D. La. May 20, 1991) (unreported); *Green v. AWI, INC.*, Docket No. 90-4387, 1991 WL 81671 (E.D.La. May 15, 1991) (unreported). This is by no means an exhaustive listing.

[22] *See, e.g., Anderson v. Texaco, Inc.*, ____ F.Supp. ____, Docket No. 90-4623, 1992 WL 160387 (E.D.La. 1992); *In Re Waterman Steamship Corp.*, 780 F.Supp. 1093 (E.D. La. 1992); *Haltom v. Lykes Steamship Co.*, 771 F.Supp. 179 (E.D. Tex. 1991); *Rollins v. Peterson Builders, Inc.*, 761 F. Supp. 943 (D.R.I. 1991).

CONCLUSION

The Fifth Circuit correctly interpreted *Miles* to foreclose the availability of loss of society damages under the general maritime law for all potential beneficiaries irrespective of the extent of injury. Further, Petitioners have not shown special and important reasons which would warrant discretionary review.

For these reasons, Respondents respectfully ask this Court to deny the petition for writ of certiorari.

Respectfully submitted,

O'NEIL, EICHIN, MILLER &
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APPENDIX A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DAVID W. MURRAY AND SALLY MURRAY	CIVIL ACTION
VERSUS	NO. 88-88
ANTHONY J. BERTUCCI CONSTRUCTION CO., INC., M/V BARBARA ANN, ET AL.	SECTION "I" (2)

We, the Jury, in the above-captioned action, unanimously find as follows:

1. Do you find from a preponderance of the evidence that plaintiff was involved in an accident as alleged on October 7, 1987? Answer "Yes" or "No."

Answer **Yes**

If you have answered Question No. 1 "Yes," proceed to Question No. 2. If you have answered Question No. 1 "No," proceed no further. Instead, sign and date the verdict form and inform the Marshal that you have reached a verdict.

2. Do you find from a preponderance of the evidence that the Defendant was negligent under the Jones Act? Answer "Yes" or "No."

Answer **Yes**

If you have answered Question No. 2 "Yes," proceed to

Question No. 3. If you have answered Question No. 2 "No," do not answer Question No. 3. Proceed, instead, to Question No. 4.

3. Do you find from a preponderance of the evidence that the Defendant's negligence under the Jones Act was a legal cause of the Plaintiff's injuries? Answer "Yes" or "No."

Answer **Yes**

Proceed to Question No. 4.

4. Do you find from a preponderance of the evidence that the Crane Barge AB-11 was unseaworthy at the time of Plaintiff's injury? Answer "Yes" or "No."

Answer **Yes**

If you have answered Question No. 4 "Yes," proceed to Question No. 5. If you have answered Question No. 4 "No," DO NOT answer Question No. 5. Proceed, instead, to Question No. 6 only if you have answered "Yes" to Question No. 3. If not, sign and date the verdict form and inform the Marshal that you have reached a verdict.

5. Do you find from a preponderance of the evidence that the Crane Barge AB-11's unseaworthiness was a legal cause of the Plaintiff's injury? Answer "Yes" or "No."

Answer **Yes**

Answer Question No. 6 only if you have answered "Yes" to either Question No. 3 OR Question No. 5. If you have answered "No" to either Question No. 2 OR Question No. 3 AND Question No. 5, sign and date the verdict form and

inform the Marshal that you have reached a verdict.

6. Do you find from a preponderance of the evidence that the Plaintiff was contributorily negligent? Answer "Yes" or "No."

Answer **No**

If you have answered Question No. 6 "Yes," proceed to Question No. 7. If you have answered Question No. 6 "No," skip Question No. 7 and Question No. 8. Proceed instead to Question No. 9.

7. Do you find from a preponderance of the evidence that the Plaintiff's contributory negligence was a legal cause of his injuries? Answer "Yes" or "No."

Answer _____

If you have answered Question No. 7 "Yes," proceed to Question No. 8. If you have answered Question No. 7 "No," DO NOT answer Question No. 8. Proceed, instead, to Question No. 9.

8. To what extent did the Plaintiff's contributory negligence cause his injuries? Answer in terms of a percentage (1% to 99%).

Answer _____%

Proceed to Question No. 9.

9. What amount, by a preponderance of the evidence, do you find will adequately compensate the Plaintiff for the injuries he received aboard the Crane Barge AB-11? This award should include all damages to which Plaintiff is en-

titled based upon his Jones Act and/or unseaworthiness claims. DO NOT make any reduction in the amount if you have found that the Plaintiff was negligent. If any reduction is appropriate, the Court will make it. Answer by means of a numerical figure.

(a)	Past loss of wages, if any	$ 35,000.00
(b)	Future loss of wages and meals, if any	$190,000.00
(c)	Future medical expenses, if any	$ 62,800.00
(d)	Past pain and suffering, disability, mental anguish, and loss of capacity for the enjoyment of life, if any	$100,000.00
(e)	Future pain and suffering, disability, mental anguish, and loss of capacity for the enjoyment of life, if any	$275,000.00

Proceed to Question No. 10 ONLY if you answered "Yes" to Question No. 5. If you answered "No" to Question No. 5, proceed no further. Sign and date the verdict form, and inform the Marshal that you have reached a verdict.

10. Do you find from a preponderance of the evidence that Plaintiff Sally Murray has suffered loss of her husband's services, comfort, society, and attentions in the past and in the future by reason of his injury? Answer "Yes" or "No."

Answer **Yes**

If you answered Question No. 10 "Yes," proceed to Question No. 11. If you answered "No" to Question No. 10, proceed to Question No. 12.

11. What amount, by a preponderance of the evidence, do you find will adequately compensate Plaintiff Sally Murray for the loss of her husband's services, comfort, society, and attentions in the past and in the future by reason of his injury? Answer by means of a numerical figure.

Answer $175,000.00

Proceed to Question No. 12.

12. Do you find from a preponderance of the evidence that Plaintiff, Desarea Murray, has suffered loss of her father's services, comfort, society, and attentions in the past and in the future by reason of his injury? Answer "Yes" or "No."

Answer Yes

If you answered Question No. 12 "Yes," proceed to Question No. 13. If you answered "No" to Question No. 12, proceed to Question No. 14.

13. What amount, by a preponderance of the evidence, do you find will adequately compensate Desarea Murray for the loss of her father's services, comfort, society, and attentions in the past and in the future by reason of his injury? Answer by means of a numerical figure.

Answer $ 37,500.00

Proceed to Question No. 14.

14. Do you find from a preponderance of the evidence that Plaintiff, David W. Murray, Jr., has suffered loss of his father's services, comfort, society, and attentions in the past and in the future by reason of his injury? Answer "Yes" or "No."

Answer **Yes**

If you answered Question No. 14 "Yes," proceed to Question No. 15. If you answered "No" to Question No. 14, proceed to Question No. 16.

15. What amount, by a preponderance of the evidence, do you find will adequately compensate Plaintiff, David W. Murray, Jr., for the loss of his father's services, comfort, society, and attentions in the past and in the future by reason of his injury? Answer by means of a numerical figure.

Answer **$ 37,500.00**

Proceed to Question No. 16.

16. Do you find from a preponderance of the evidence that Plaintiff, Darryl Murray, has suffered loss of his father's services, comfort, society, and attentions in the past and in the future by reason of his injury? Answer "Yes" or "No."

Answer **Yes**

If you answered "Yes" to Question No. 16, proceed to Question No. 17. If you answered "No" to Question No. 16, sign and date the verdict form and inform the Marshal that you have reached a verdict.

17. What amount, by a preponderance of the evidence, do you find will adequately compensate Plaintiff, Darryl Murray, for the loss of his father's services, comfort, society, and attentions in the past and in the future by reason of his injury? Answer by means of a numerical figure.

Answer $ 37,500.00

Please sign and date the verdict form and inform the Marshal that you have reached a verdict.

New Orleans, Louisiana, this 11th day of September, 1990.

/s/ Anthony L. Pounders

Foreperson

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DAVID W. MURRAY	*	CIVIL ACTION
	*	
versus	*	NO. 88-0088
	*	
ANTHONY J. BERTUCCI CONSTRUCTION CO., et al.	*	SECTION "I" (2)

MOTION FOR NEW TRIAL OR ALTERNATIVELY FOR REMITTITUR OF DAMAGES

NOW INTO COURT, through undersigned counsel, come defendants, Anthony J. Bertucci Construction Company, Inc. and Pacific Employers Insurance Company and respectfully move for a new trial or alternatively for remittitur of damages pursuant to Fed. R. Civ. P. 59(e), all as more fully set forth in the accompanying memorandum of law.

WHEREFORE, the premises considered, defendants, Anthony J. Bertucci Construction Co., Inc. and pacific Employers Insurance Company respectfully pray that an ORDER be entered granting a new trial on the issue of damages or alternatively remittitur of damages, and for all general and equitable relief afforded by the premises herein.

/s/ A.N.B. IV

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of Nov., 1990, a copy of this pleading has been served upon each other party via telefax, prepaid, and by U. S. Mail.

/s/ A.N.B. IV

OF O'Nneil, Eichin, Miller & Breckinridge

ANB/DMURRAY/NEWTRIAL.MIN

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DAVID W. MURRAY	*	CIVIL ACTION
	*	
versus	*	NO. 88-0088
	*	
ANTHONY J. BERTUCCI CONSTRUCTION CO., et al.	*	SECTION "I" (2)

MEMORANDUM IN SUPPORT OF MOTION FOR NEW TRIAL OR ALTERNATIVELY FOR REMITTITUR OF DAMAGES

MAY IT PLEASE THE COURT:

The Court will recall that this matter was tried to a jury for five days following which a verdict was returned against defendants, A.J. Bertucci Construction Co., Inc. and Pacific Employers Insurance Company, in the total amount of $668,000 for plaintiff, David Murray, and in the amount of $175,000 for plaintiff, Sally Murray. Because these amounts are excessive and were apparently based on the jury's passion and prejudice, defendants are obliged to move for a new trial on the issue of damages or, alternatively, for remittitur.

PRELIMINARY STATEMENT

Plaintiff, David Murray, was injured when he fell on an accumulation of rock on the deck of the spud barge AB-11. He served out the remainder of his hitch and after complaining of back pain came under the care of Dr. Raeburn Llewellyn who admitted him to humana Hospital

for observation and conservative therapy on October 26, 1987. Dr. Llewellyn eventually determined that surgery was appropriate and proceeded to perform a decompression laminectomy at L4-5 accompanied by the excision of a spondylolesthetic defect at L5-S1 and a fusion performed by Dr. Kenneth Veca. Plaintiff was discharged from the hospital on December 20, 1987, ten days after the surgery. Dr. Llewellyn testified that the surgery was uneventful and that plaintiff obtained a good result. Although plaintiff has remained under Llewellyn's care due to continuing complaints of pain, Dr. Llewellyn testified that the fusion has healed solid and that he does not recommend any further surgical procedures. While Dr. Llewellyn stated on direct examination that he felt plaintiff was a chronic pain patient, he acknowledged on cross-examination that he had recommended that plaintiff undergo a course of physical therapy which he would expect to improve plaintiff's condition and that plaintiff had not done so. Dr. Llewellyn also acknowledged that programs such as the Touro Infirmary Back-in-Action Program would potentially help to alleviate plaintiff's complaints, assuming that plaintiff would faithfully complete such a program.

Plaintiff also introduced the testimony of a psychiartrist, Dr. Richard Richoux, who diagnosed plaintiff as suffering from chronic major depression primarily caused by his physical disability. This depression manifested itself in symptoms such as irritability, crying spells, and a lack of sexual appetite. Dr. Richoux also testified that while plaintiff experienced episodes of passive suicidal ideation, he did not consider plaintiff to be a suicide threat. Dr. Richoux acknowledged that plaintiff's depression symptoms should improve, particularly if he would engage in a vocational rehabilitation program within his physical limitations. There was nothing to indicate that plaintiff could not succeed in such a program and Dr. Richoux acknowledged that

plaintiff needed to initiate such activity as a first step to breaking out of his depression.

Finally, Mrs. Murray testified that prior to his accident she and her husband had an intimate and loving relationship accompanied by frequent sexual relations and that since his accident their sexual relationship was significantly limited. Mrs. Murray also testified that her husband was depressed and irritable. Finally, she stated that she was required to assist him in bathing and dressing and to provide some assistance because of bowel dysfunction.

In sum, the injury in this case involved a typical herniated intervertebral disc at L4-5 with an interbody fusion at L5-S1. Plaintiff's treating physician testified that the surgery was routine and his recovery uneventful. While plaintiff is continuing to complain of pain, his treating physician has recommended physical therapy and believes that physical therapy would be of benefit to plaintiff in relieving his symptoms. Plaintiff's treating psychiatrist is also of the view that a course of physical therapy and vocational rehabilitation would be of benefit in relieving plaintiff's symptoms of depression. While their relationship has been altered, Mrs. Murray has suffered no physical injuries. Under the circumstances, the award to Mrs. Murray in the amount $175,000 is excessive as is the general damages award to David Murray in the amount of $375,000.

SUMMARY OF POINTS AND AUTHORITIES

Defendants are mindful that the standard for granting motions for new trial on damages or, alternatively, for remittitur are exacting. The standard was most recently discussed by the Fifth Circuit in *Simeon v. T. Smith & Son., Inc.*, 852 F.2d 1421 (5th Cir. 1988) in which the court found:

> It is well settled that a jury's damages award should not be disturbed unless it is "entirely disproportionate to the injury sustained." *Caldarera v. Eastern Airlines, Inc.*, 705 F.2d 778 (5th Cir. 1988). If the jury's award is unacceptably disproportionate, either the district or appellate court should reduce the award to "the maximum amount the jury could properly have awarded." *Haley v. Pan American World Airways, Inc.*, 746 F.2d 311 (5th Cir. 1984).

Id. at 1426.

Although recognizing that a Court reviewing a quantum award should avoid being "rigidly circumscribed" by prior decisions, the *Simeon* court nevertheless sought guidance from prior cases involving comparable injuries. Concluding that the jury's pain and suffering award of $1,250,000 was excessive (plaintiff's injury involved a partially severed foot), the Fifth Circuit found that $600,000 was the maximum reasonable damage award and noted that if plaintiff would not accept a remittitur on this basis a new trial would be in order. *Id.* at 1427.

Because the awards to plaintiffs in this matter are "entirely disproportionate to the injury sustained" remittitur is in order.

The award to Mrs. Murray should be remitted to $25,000.

Defendants have exhaustively reviewed both Fifth Circuit and Louisiana decisions from 1985 to date to ascertain the loss of consortium awards to spouses whose husbands have suffered low back or similar injuries. These loss of consortium awards range from a high of $75,000 to a low of $400 but average approximately $10,000. Defendants have attached for the Court's ready reference as

Exhibit "A" a schedule providing citations to these cases and summarizing the awards. A brief discussion of some representative cases may be helpful at this point.

In *Spangler v. North Star Drilling Co.*, 552 So. 2d 673 (La. App. 2d Cir. 1989), the wife of a Jones Act seaman who underwent an MRI and two back surgeries had her loss of consortium award reduced from $75,000 to $25,000 by the Court of Appeal which noted that the accident had not caused a loss of love between the seaman and his spouse, and that the seaman and his spouse would actually be able to spend more time together after the injury because the seaman would no longer be working offshore. The court was also mindful that the couple's sexual relationship had been impaired but nevertheless determined, after reviewing the case law, that an award of $25,000 to the spouse in loss of consortium damages was appropriate.

The *Spangler* court relied on several cases in justifying the reduction of the loss of consortium claim to $25,000. For example, in *Finley v. Bass*, 478 So. 2d 608 (La. App. 2d Cir. 1985), the husband had sustained an aggravated back injury. The plaintiff proved a loss of sexual relations and potential loss of services and the Court of Appeal affirmed an award of $5,000 for loss of consortium. In *Thomas v. State Farm Insurance Co.*, 499 So. 2d 562 (La. App. 2d Cir. 1986), the injured spouse sustained a back injury which resulted in a lengthy recovery period, suffered a personality change, and was unable to prerform sexually. These allegations of course are similar to those made in the present case. the jury awarded the spouse $300,000 in loss of consortium damages but the Court of Appeal reduced that award to $20,000. Finally, in *Sexton v. Louisiana Vacuum Services, Inc.*, 506 So. 2d 780 (La. App. 1st Cir. 1987), a case where the injured spouse suffered from a variety of injuries including a cervical and lumbar strain,

contusions, fractured scapula, lacerations of the face and fractured teeth and where the injured spouse's wife testified that she had to act as a nurse in caring for him and that their sexual relationship had suffered along with a decline in their social life, the Court of Appeal affirmed the $10,000 loss of consortium award.

The highest loss of consortium award in a case involving injuries similar to David Murray's was in the amount of $75,000. *Tracy v. Jefferson Parish*, 523 So. 2d 266 (La. App. 5th Cir. 1988). In that case, the husband was severly injured and disabled, the marriage of the couple deteriorated to the point where the wife sought counsel from a psychiatrist and she reported that she had no hopes of having children as a result of the injury. The *Spangler* court noted these "special circumstances" particularly the wife's lost hope of having children as justifying a $75,000 award. These circumstances do not exist in this case inasmuch as the Murrays already have three children.

The court may recall that Mrs. Murray made a rather dramatic appearance on the witness stand as she cried practically throughout the entirety of her testimony. This undoubtedly served to inflame the jury resulting in their inflated award. Defendants have found only one case, *Tracy*, in which a loss of consortium award was as high as $75,000. The *average* award for all loss of consortium cases involving low back injuries during this time period is approximately $10,000. Like the spouse in *Spangler*, Mrs. Murray will have the benefit of her husband's presence to a greater extent following his accident than she did before his accident when he was offshore a majority of the time. Moreover, the medical testimony is to the effect that Mr. Murray's physical condition should improve once he begins to engage in therapy and his psychiatrist testified that this should also serve to improve his symptoms of depression.

In reviewing the damage award, the Court should remember that this incident involves a single lumbar laminectomy and fusion, a surgical procedure which plaintiff's own neurosurgeon testified was routine and from which plaintiff recovered uneventfully. Although he continues to complain of pain, this is not a case involving multiple surgeries or a case involving such damage to the spinal column as to render a plaintiff paraplegic. This is a simple back case and the loss of consortium award in the amount of $175,000 is manifestly excessive. Considering the defendants' research has revealed only one case involving low back injuries in which a loss of consortium award was as much as $75,000, and further considering that loss of consortium awards in such cases average $10,000, it is respectfully urged that the *maximum* recoverable award for Mrs. Murray under these circumstances is $25,000.

The general damages award to David Murray of $375,000 is excessive and should be reduced to $250,000.00.

While defendants acknowledge that the question whether to reduce David Murray's general damages award presents a closer issue than that presented by Mrs. Murray's loss of consortium award (which is substantially beyond the bounds of maximum recovery), defendants nevertheless urge the Court to carefully scrutinize the general damages award to Mr. Murray. The Court will recall that Mr. Murray underwent *a single surgical procedure* involving a laminectomy and lumbar fusion. The *Spangler, supra*, court considered a more serious injury that required plaintiff to undergo three separate myelograms, an MRI and two back surgeries and reduced a general damages award from $600,000 to $375,000. The court observed as follows:

Typically, awards between $125,000 to $175,000

> are usually allowed in cases where the plaintiff has sustained a back injury and has undergone a *single back surgery*. This range of recovery is usually associated in cases where the plaintiff has undergone a disclaminectomy and a fusion of his spine and the same operatio. *See Wactor v. Pickens Lumber*, 505 So. 2d 815 (La. App. 2d Cir. 1987) and the cases cited therein. (Emphasis supplied.)

Spangler, supra, at 682.

Because the plaintiff in *Spangler* had undergone two surgeries, the court felt that the award of $375.000 was the maximum allowable. Plaintiff in this case has undergone only one surgery. The Fifth Circuit has not hesitated to reduce excessive awards in similar cases. In the recent case of *Williams v. Chevron USA, Inc.*, 875 F.2d 501 (5th Cir. 1989), the Fifth Circuit reduced a general damages award from $400,000 to $200,000 in a case involving a single level cervical laminectomy and fusion. In support of its decision, the court cited its previous decision in *Holmes v. J. Ray McDermott & Co., Inc.*, 734 F.2d 1110 (5th Cir. 1984) in which it affirmed a general damages award of less than $180,000 to a plaintiff who had suffered a herniated *lumbar* disc necessitating one surgery and who complained of suffering from continual pain and discomfort and, according to a psychologist, suffered ongoing depression. The court noted that this award was "very generous but not shocking to our conscience." *Id.* at 1119. David Murray's injury and recovery are almost identical to that described by the court in *Holmes*. Mr. Murray has undergone a single surgical procedure, continues to complain of pain and discomfort, and has been diagnosed as suffering from depression. The *Holmes* court described an award of less than $180.000 under similar circumstances as being "very generous."

An award of $375,000 in general damages to David Murray is simply outside the maximum allowable for such an injury. Indeed, in *Myers v. Griffin-Alexander Drilling Co.*, 910 F.2d 1252 (5th Cir. 1990), the Fifth Circuit indicated that an award in general damages of $185,000 was appropriate in a case involving a herniated lumbar disc requiring one surgical procedure. *See also Cooper v. Offshore Express, Inc.*, 717 F. Supp. 1180 (W.D. La. 1989) in which Judge Scott awarded $150,000 in general damages to a Jones Act seaman who had undergone a lumbar laminectomy and whose prognosis with respect to continuing and future pain and discomfort was described by his physician as fair to poor. The plaintiff also, like Mr. Murray, had symptoms of psychological overlay. Nevertheless, Judge Scott felt that $150,000 was sufficient compensation under the circumstances. *Id.* at 1188. Considering that Mr. Murray has undergone a single routine surgical procedure and that his physicians have indicated that his condition may improve if he will engage in a course of physical and vocational rehabilitation therapy, an award of $250,000 in general damages would constitute the maximum allowable recovery. Such a finding would reduce Mr. Murray's total award to $543,000 which is a more than ample award under the circumstances.

CONCLUSION

The Court will recall that this trial was vigorously contested and involved a number of emotional moments, particularly when Mrs. Murray cried during her direct examination. This undoubtedly incited the jury to return excessive awards. The loss of consortium award to Mrs. Murray of $175,000 is clearly beyond the outer limits of reasonableness not only in view of the facts of the case but also in view of previous awards in similar cases. The general damages award to Mr. Murray of $375,000, while

presenting a slightly closer case, should be subject to the Court's closest scrutiny following which defendants respectfully urge that it should be reduced to $250,000, which constitutes the maximum allowable recovery for a lumbar disc injury necessitating a single surgery. In so doing, the Court would nevertheless leave the Murrays a total award of $568,000 which would fully and adequately compensate them for the injuries sustained in the case.

Respectfully submitted,

/s/ A.N.B. IV

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of Nov., 1990, a copy of this pleading has been served upon each other party via telefax, prepaid, and by U. S Mail.

/s/ A.N.B. IV

OF O'Nneil, Eichin, Miller & Breckinridge

ANB/MURRAY/NEWTRIAL.SPT.

ATTACHMENT

Case	Injury
Romaire v. Winn-Dixie 478 So.2d 971 (1985)	Lumbar strain, fractured coccyx, wrist sprain
DeVille v. K-Mart 498 So. 2d 1122 (1986)	15 % knee disability 20-25% back disability
Morris v. Highlands 525 So.2d 179 (1988)	Degenerative disc disease
Comeaux v. Poindexter 527 So. 2d 1184	Cervical strain psychological problems
Whitehead v. Fireman's Fund 529 So. 2d 82	Cervical strain
Mims v. Reliance Ins. Co. 535 So. 2d 1085	Aggravation of disc disease; neck and back pain
Peterson v. Western World Insurance Co. 536 So. 2d 639	Comporession fracture lumbar spine; fractured right ankle, left heel

ATTACHMENT

Cause	Loss of Consortium	Year
Slip and fall 47-year old housewife	$4,000.00 ($19,000 total)	11/12/85
Slip and fall convenience store employee	$75,866.00 ($350,000 total)	12/20/86
Auto accident housewife	$10,000 ($50,000 gen. damages) ($12,421 special damages)	1988
Auto accident	$15,000.00 ($40,000 gen. damages) ($11,852 special damages)	1988
Auto accident	$5,625.00 ($21,000 gen. damages) ($17,500 special damages)	1988
Auto accident 63-year old maid	$400.00	1988
Fall from water tank- 39 year old businessman	$25,000.00 ($400,000 gen. damages) ($131,586 special damages)	1988

ATTACHMENT (continued)

Case	Injury
Soudelier v. Miller 537 So. 2d 296	Bulging cervical disc; permanent nerve injury
Kumble v. Wal-Mart Stores 539 So.2d 1212	Neck and arm pain, swelling in back
Fuller v. Moser 539 So. 2d 784	Neck injury
Vaccaro v. Sports *& Imports* 539 So. 2d 989	Cervical strain disc bulge
Thomas v. Hartford *Ins. Co.* 540 So. 2d 1068	Cervical strain, eye abrasion, arm pain
Bergeron v. K-Mart 540 So. 2d 406	Head and neck, herniated disc at C3-C4-C5, cervical fusions
Henry v. National 542 So. 2d 102	Bulging cervical discs C5-C6-C7
Fuqua v. Aetna 542 So. 2d 1129	Spinal cord contusion, broken neck

ATTACHMENT (continued)

Cause	Loss of Consortium	Year
Auto accident	$5,000.00 ($60,000 gen. damages) ($190,000 special damages)	1988
Slip and fall 24-year old spouse	$10,000.00 ($50,000 gen. damages) ($35,533 special damages)	
Auto accident	$5,000.00 ($5,000 gen. damages) ($796 special damages)	1989
Auto accident 40-year old woman with 2 children	$25,000.00 ($75,000 gen. damages)	1989
Truck accident	$5,000 ($40,000 gen. damages) ($9,352 special damages)	1989
Slip and fall 34-year old hus- band and children	$10,000 ($60,000 gen. damages) ($66,000 special damages)	1989
Auto accident 22-year old nurse	$5,000.00 ($65,000 gen. damages) ($115,000 special damages)	1989
Auto accident	$13,000.00 ($402,000 gen. damages) ($215,000 special damages)	1989

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DAVID W. MURRAY	*	CIVIL ACTION
	*	
versus	*	NO. 88-0088
	*	
ANTHONY J. BERTUCCI CONSTRUCTION CO., et al.	*	SECTION "I" (2)

NOTICE OF MOTION

TO: **Mr. John W. deGravelles**
deGravelles, Palmintier & Holthaus
628 St. Louis Street
Baton Rouge, Louisiana 70802

PLEASE TAKE NOTICE that defendants, Anthony J. Bertucci Construction Co., Inc. and Pacific Employers Insurance Company, will bring on for hearing their motion for new trial or alternatively for remittitur of damages before the Hon. Henry A. Mentz on Wednesday, December 5, 1990 at 9:00 A.M., United States District Court, Eastern District of Louisiana, 500 Camp Street, New Orleans, Louisiana or as soon thereafter as counsel may be heard.

/s/ A.N.B. IV

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Telephone: (504) 525-3200
Attorneys for Anthony J. Bertucci Construction Co., Inc. and Pacific Employers Insurance Company

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of Nov., 1990, a copy of this pleading has been served upon each other party via telefax, prepaid, and by U. S. Mail.

/s/ A.N.B. IV

OF O'Nneil, Eichin, Miller & Breckinridge

ANB/DMURRAY/NEWTRIAL.NTC

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

Filed Dec 11 1990

DAVID W. MURRAY and SALLY MURRAY	CIVIL ACTION
VERSUS	NO. 88-88
ANTHONY J. BERTUCCI CONSTRUCTION CO., ET AL	SECTION "I" (2)

ORDER AND REASONS

The court has before it two motions: a motion for alteration or amendment of judgment or alternatively for partial new trial on the issue of award for children's loss of consortium filed by the plaintiffs (the Murrays); and a motion for new trial or alternatively for remittitur of damages filed by the defendant (Bertucci).

I. CHILDREN'S LOSS OF CONSORTIUM CLAIM

The plaintiff has urged the court to reconsider its earlier ruling denying the Murray children a claim for loss of consortium. After such reconsideration, the court adheres to its original ruling denying the claim for the reasons given in its memorandum opinion on the issue.

II. MOTION FOR NEW TRIAL OR REMITTITUR OF DAMAGES

At the conclusion of a five-day trial, the jury returned a verdict for David Murray in the amount of $668,000

Date of Entry
DEC 13 1990

and for Sally Murray in the amount of $175,000. Bertucci argues that the general damages award of $375,000 awarded to David Murray and the $175,000 loss of consortium award to Sally Murray are excessive. It urges the court either to grant a new trial or to grant a remittitur.

A review of the facts of the case shows that David Murray fell on some rocks that had accumulated on the deck of the barge on which he was working. He was treated by Dr. Raeburn Llewellyn who performed a decompression laminectomy at L4-5 accompanied by the excision of a spondylolesthetic defect at L5-S1 and a fusion performed by Dr. Kenneth Veca. The fusion has healed solid and further surgery is not recommended. Despite the apparent success of the surgery, David Murray suffers from chronic pain. The plaintiff's physicians attribute the pain to formation of scar tissue. He is unable to dress himself without assistance; he is unable to walk or stand for any length of time without the use of a cane; he must wear a back brace or TENS unit; he is unemployable; he cannot drive a car or perform any household chores. Furthermore, he is unable to have normal sexual relations with his wife and must rely on her assistance to have a bowel movement. The constant pain and inability to care for himself have caused David Murray to become severely depressed and occasionally even suicidal.

The defendant introduced expert testimony that indicated physical therapy might provide some relief to David Murray. However, plaintiff's experts indicated that David Murray would not make any significant improvement if he entered a course of physical therapy. In their opinion, David Murray would experience pain for the rest of his life and would require the assistance of another person to perform his daily activities.

The result of this case indicates to the court that the jury found the plaintiff's expert more persuasive. Although David Murray had only one back surgery, he still suffers from unremitting and debilitating back pain. The court finds this case to be similar to *Andrews v. Mosley Well Service*, 514 So. 2d 491 (La. Ct. App. 3d Cir. 1987). The plaintiff, Andrews, suffered an injury to his back that required a decompression surgery. Six months after the surgery, the time of maximum cure, Andrews was still suffering pain and disability. Andrew's doctors testified that he could never return to manual labor, he could not stoop, bend, lift, pull, or climb, nor could he sit or stand for long periods of time. His condition was permanent. Andrews received $400,000 in general damages.

In light of the *Andrews* decision, the court finds that the $375,000 award for general damages given to David Murray is not "entirely disproportionate to the injury sustained." *Simeon v. T. Smith & Son, Inc.*, 852 F.2d 1421, 1426 (5th Cir. 1988) (quoting *Caldarera v. Eastern Airlines*, 705 F.2d 778 (5th Cir. 1988)).

The court likewise finds that the award to Sally Murray is not so disproportionate as to require a new trial or a remittitur. After David Murray's accident, the relationship between the Murray's changed from that of husband-wife to that of mother-child. Mr. Murray became incapable of aiding his wife around the house; of working and supporting his wife; of engaging in sexual relations with his wife; and of caring for himself on a daily basis. Mr. Murray also suffers from severe depression, which makes the "*relationship between the Murrays that much more difficult.*"

To argue, as does the defendant, that $25,000 will

compensate Sally Murray for her losses in ludicrous. According to the plaintiff's doctors, David Murray has become almost physically useless and greatly impaired mentally due to his depression; Sally Murray is no longer living with the same man she married. His condition is likely to be permanent.

Accordingly,

IT IS ORDERED that the the plaintiffs' motion for alteration of judgment or alternatively for partial new trial on the issue of award for children's loss of consortium is DENIED.

IT IS FURTHER ORDERED that the defendant's motion for new trial or alternatively for remittitur of damages is DENIED and the hearing scheduled on the motions for DECEMBER 5, 1990 is CANCELED.

New Orleans, Louisiana this 11th day of December, 1990.

/s/ Henry A. Mentz

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

Filed Dec 17 1990

MINUTE ENTRY
DECEMBER 14, 1990
MENTZ, J.

DAVID W. MURRAY and SALLY MURRAY	CIVIL ACTION
VERSUS	NO. 88-88
ANTHONY J. BERTUCCI CONSTRUCTION CO., ET AL	SECTION "I" (2)

It has been brought to the court's attention that a line was inadvertently left out of this court's order and reasons dated December 11, 1990.

Accordingly,

IT IS ORDERED that the order and reasons dated December 11, 1990 be AMENDED and the following phrase be inserted at the bottom of page three: "relationship between the Murrays that much more difficult."

Clerk to serve all counsel.

DATE OF ENTRY
DEC 17 1990

APPENDIX D

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

Filed Jan 9 1991

DAVID W. MURRAY	*	CIVIL ACTION
and SALLY MURRAY	*	
	*	NO. 88-0088
versus	*	
	*	SECTION "I" (2)
	*	
ANTHONY J. BERTUCCI	*	
CONSTRUCTION CO. and	*	
PACIFIC EMPLOYERS	*	
INSURANCE COMPANY	*	

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that defendants, Anthony J. Bertucci Construction Company and Pacific Employers Insurance Company hereby appeal to the United States Court of Appeals for the Fifth Circuit from that portion of the judgment entered on November 7, 1990 in favor of plaintiff, Sally Murray, in the amount of $175,000.00 for her loss of consortium claim and from the district court's order entered December 13, 1990 denying defendant's motion for new trial or alternatively remittitur of plaintiff's loss of consortium award.

New Orleans, Louisiana, this 9th day January, 1991.

/s/ A.N.B. IV

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Attorneys for Anthony J. Bertucci Construction Co., Inc. and Pacific Employers Insurance Company

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of January, 1991, a copy of this pleading has been served upon each other party to this action by depositing same in the United States mails properly addressed to his, her, or its counsel of record, first class postage prepaid.

/s/ A.N.B. IV

OF O'Neil, Eichin, Miller & Breckinridge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

Filed Jan 15 1991

DAVID W. MURRAY	*	CIVIL ACTION
and SALLY MURRAY	*	
	*	
versus	*	
	*	NO. 88-0088
	*	
ANTHONY J. BERTUCCI	*	SECTION "I" (2)
CONSTRUCTION CO. and	*	
PACIFIC EMPLOYERS	*	
INSURANCE COMPANY	*	

STATEMENT OF ISSUES TO BE PRESENTED ON APPEAL BY APPELLANTS ANTHONY J. BERTUCCI CONSTRUCTION COMPANY, INC. AND PACIFIC EMPLOYERS INSURANCE COMPANY

NOW INTO COURT, through undersigned counsel, come defendants/appellants, Anthony J. Bertucci Construction Company, Inc. and Pacific Employers Insurance Company, and pursuant to F.R.A.P. 10(b)(3) respectfully submit the following statement of the issues to be presented on appeal:

1. Whether the award in the amount of $175,000.00 to plaintiff, Sally Murray, in connection with her loss of consortium claim was excessive.

2. Whether the district court committed error in denying defendants' motion for new trial, or alternatively, for remittitur on the issue of the excessiveness of the loss of consortium award to plaintiff, Sally Murray.

Respectfully submitted,

/s/ A.N.B. IV

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of January, 1991, a copy of this pleading has been served upon each other party to this action by depositing same in the United States mails properly addressed to his, her, or its counsel of record, first class postage prepaid.

/s/ A.N.B. IV

OF O'Neil, Eichin, Miller & Breckinridge

APPENDIX E

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

Filed Feb 19 1991

DAVID W. MURRAY and SALLY MURRAY	*	CIVIL ACTION
versus	*	NO. 88-0088
ANTHONY J. BERTUCCI CONSTRUCTION CO. and PACIFIC EMPLOYERS INSURANCE COMPANY	*	SECTION "I" (2)

SUPPLEMENTAL AND AMENDED STATEMENT OF ISSUES TO BE PRESENTED ON APPEAL BY APPELLANTS ANTHONY J. BERTUCCI CONSTRUCTION COMPANY, INC. AND PACIFIC EMPLOYERS INSURANCE COMPANY

NOW INTO COURT, through undersigned counsel, come defendants/appellants, Anthony J. Bertucci Construction Company, Inc. and Pacific Employers Insurance Company, and pursuant to F.R.A.P. 10(b)(3) respectfully supplement and amend their statement of issues to be presented on appeal as follows:

3. Whether the spouse of an injured seaman has a cause of action for loss of consortium and society under the general maritime law of the Supreme Court's recent decision in *Miles v. Apex Marine Corp.*, ___ U.S. ___, 111 S. Ct. 317 (1990). *See, Anglada v. Tidewater, Inc.*, C.A. 90-1638 (E.D.La. Feldman, J., 1990).

Respectfully submitted

/s/ A.N.B. IV

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of January, 1991, a copy of this pleading has been served upon each other party to this action by depositing same in the United States mails properly addressed to his, her, or its counsel of record, first class postage prepaid.

/s/ A.N.B. IV

OF O'Neil, Eichin, Miller & Breckinridge

APPENDIX F

David W. MURRAY, Individually and as Administrator of the Estates of his minor children Desiree Murray, David W. Murray, Jr., Darry Scott Murray, and Sally W. Murray,

Plaintiffs-Appellants,

Sally W. Murray,

Plaintiff-Appellant

Cross-Appellee,

v.

ANTHONY J. BERTUCCI CONSTRUCTION COMPANY, INC., and Pacific Employers Insurance Company,

Defendants-Appellees

Cross-Appellants.

No. 91-3044.

United States Court of Appeals, Fifth Circuit.

April 16, 1992.

Injured seaman brought suit under general maritime law and Jones Act. The United States District Court for the Eastern District of Louisiana, Henry A. Mentz, Jr., J., 745 F.Supp. 373, entered judgment on jury award to injured seaman and spouse, but struck jury's award of loss of society to their children. Appeal was taken by both parties. The Court of Appeals, W. Eugene Davis, Circuit Judge, held that: (1) spouse of injured seaman did not have

claim for loss of society under general maritime law; (2) injured seaman's children did not have claim for loss of society; and (3) new rule was to be applied to parties before court.

Vacated in part, affirmed in part, and remanded.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before THORNBERRY, GARWOOD and DAVIS, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

This appeal asks us to consider, for the first time, whether the Supreme Court's decision in *Miles v. Apex Marine Corp.*, ___ U.S. ___, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990), bars the spouse of an injured seaman from recovering loss of society. Cross-appellants Anthony J. Bertucci Construction Company and Pacific Employers Insurance Company (collectively "Bertucci") contend that we should reverse the jury's award to Mrs. Murray for her loss of society in light of *Miles*. Because we conclude that *Miles*, properly extended, precludes an injured seaman's spouse from recovering loss of society, we vacate the jury's award to Mrs. Murray and remand. We also consider the Murrays' appeal of the district court's decision to strike the jury's award of loss of society to their children. We conclude, however, that the court did not err in striking the children's recovery and, therefore, affirm that decision.

I.

In 1987, David W. Murray suffered a serious back injury while working as a deckhand for Bertucci aboard the

M/V BARBARA ANN in Louisiana territorial waters. Following the accident, Mr. Murray sued Bertucci for negligence under the Jones Act, 46 U.S.C.App. § 688, and for unseaworthiness under the general maritime law. Mr. Murray later amended his suit to add claims on behalf of his wife and children for their loss of society.

On September 11, 1990, the jury found the M/V BARBARA ANN unseaworthy and Bertucci negligent and awarded Mr. Murray $662,000. The jury also awarded Mrs. Murray $175,000 and their children $37,500 each for past and future loss of society. The district court, however granted Bertucci's motion to strike the children's claims. *See Murray v. Anthony J. Bertucci Construction Co.*, 745 F.Supp. 373 (E.D.La.1990). The court entered judgment in accordance with the jury's verdict and its ruling on the children's claims. After the court denied the parties' post-judgment motions, both sides filed timely appeals.

II.

[1] For the first time on appeal, Bertucci challenges Mrs. Murray's right to recover for her loss of society in view of the Supreme Court's decision in *Miles*. Ordinarily, we do not consider issues that an appellant has not raised previously in the district court. *See generally* Steven Alan Childress and Martha S. Davis, *Standards of Review* § 6.3 (1st ed. 1986) (discussing court review of issues raised for the first time on appeal). This court has recognized, however, that "when a question is one of pure law, and when refusal to consider it will lead to an incorrect result or a miscarriage of justice, appellate courts are inclined to consider questions first raised on appeal." *Nilsen v. City of Moss Point, Mississippi*, 674 F.2d 379, 387 n. 13 (5th Cir.1982), *rev'd en banc on other grounds*, 701 F.2d 556 (5th Cir.1983). *See also Empire Life Ins. Co. of America v.*

Valdak Corp., 468 F.2d 330, 334 (5th Cir.1972). The Supreme Court has characterized the matter of what issues of a court of appeals may consider for the first time on appeal as "one left primarily to the discretion of the courts of appeals, to be exercised on the facts of the individual cases." *Singleton v. Wulff*, 428 U.S. 106, 121, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976).

The particular circumstances in this case persuade us to consider the effect of *Miles* on Mrs. Murray's right to recover, despite Bertucci's failure to present this question to the district court. Here, the Supreme Court decided *Miles* nearly two months after the jury returned its verdict and only one day before the district court entered judgment. *Cf. Hegger v. Green*, 646 F.2d 22 (2d Cir.1981) (reversing an award for loss of consortium because an intervening state court decision held that loss of consortium damages were not recoverable in wrongful death actions).

Moreover, at the time of the district court's decision, the Fifth Circuit recognized loss of society claims by spouses of seamen injured in territorial waters. *See Cruz v. Hendy Int'l Co.* 638 F.2d 719 (5th Cir.1981). Any objection to Mrs. Murray's claim would have been in vain because the district court would have been obliged to overrule it in light of this court's clear authority in *Cruz*. As other circuits have recognized, this court should not require a party to object " 'when it would not have produced any results in the trial court because a "solid wall of Circuit authority" then foreclosed the point.' " *Davis v. Mason County*, 927 F.2d 1473, 1481 (9th Cir.) (quoting *Robinson v. Heilman*, 563 F.2d 1304, 1307 (9th Cir.1977), *cert. denied*, ____ U.S. ____, 112 S.Ct. 275, 116 L.Ed.2d 227 (1991)).

In fact, even knowledge of the *Miles* appeal would not necessarily have given Bertucci the foresight to raise

its objection earlier. The Supreme Court granted certiorari in *Miles* to consider the Fifth Circuit's decision to reaffirm its prior holding in *Sistrunk v. Circle Bar Drilling Co.*, 770 F.2d 455 (5th Cir.1985), *cert. denied*, 475 U.S. 1019, 106 S.Ct. 1205, 89 L.Ed.2d 318 (1986). In *Sistrunk*, this court held that a *nondependent parent* could not recover for loss of society in a general maritime *wrongful death* action. *Murray*, on the other hand, involves an action for personal injuries, not wrongful death, and claims by a seaman's spouse and children.

Several other factors weigh heavily in favor of considering this question. First, the question of whether *Miles* extends to loss of society claims brought by spouses of injured seamen is a "pure question of law." We need not remand this question to the district court for the determination of any factual issues because the facts here are not in dispute. Moreover, as we discuss below, we find that the proper resolution of this question in Bertucci's favor is beyond any doubt and a contrary decision would therefore constitute an injustice. *See Singleton*, 428 U.S. at 121, 96 S.Ct. at 2877; *Nilsen*, 674 F.2d at 387 n. 13.

Consideration of this question for the first time on appeal also does not present us with a situation where a party has not had an opportunity to argue his position. Both parties have addressed this question fully in their briefs to us and at oral argument. Mrs. Murray, therefore, has had a sufficient opportunity to develop and present her argument and would not be prejudiced if we consider this question. Finally, as the Second Circuit has observed, "[i]t is well settled that on direct review an appellate court must apply the law in effect at the time it renders its decision, unless doing so would cause manifest injustice." *Hegger*, 646 F.2d at 26 (citations omitted). *See also Empire Life Ins. Co.*, 468 F.2d at 334 ("Our duty is to enunciate the law on

the record facts."). Having determined that Bertucci's cross-appeal is properly before us, we turn to the merits of Bertucci's argument.

III.

[2] In *Miles v. Apex Marine Corp.*, the Supreme Court addressed the question of whether a nondependent parent of a seaman who was killed by a fellow crew member could recover loss of society under the general maritime law. ____ U.S. ____, 111 S.Ct. 317, 112 L.Ed.2d 275, 283 (1990). The Court held first that the general maritime law recognizes a cause of action for the wrongful death of a seaman. *Id.* at ____, ____, 111 S.Ct. at 324, 328, 112 Ed.2d at 289, 293-94. The Court concluded, however, that this general maritime action for a seaman's wrongful death does not include recovery for loss of society. *Id.* at ____, ____, 111 S.Ct. at 326, 328, 112 L.Ed.2d at 291, 294.

The present appeal concerns the implications of this second holding. More particularly, cross-appellant Bertucci argues that the reasoning the Supreme Court used in *Miles* in precluding recovery of nonpecuniary damages under the general maritime law in a wrongful death action also applies to a seaman's personal injury action. According to Bertucci, that same reasoning will bar the spouse of an *injured* seaman from recovering nonpecuniary losses, such as loss of society. The Murrays contend that *Miles* does not apply to an injury case and that we should uphold the jury's award of loss of society to Mrs. Murray under two earlier decisions, *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 100 S.Ct. 1673, 64 L.Ed.2d 284 (1980) and *Cruz v. Hendy Int'l Co.*, 638 F.2d 719 (5th Cir.1981). For the reasons that follow, we agree with Bertucci that *Miles* precludes Mrs. Murray's recovery for loss of society. To explain our conclusion, however, we must first consider how

the Supreme Court arrived at its holding in *Miles*.

As the Supreme Court noted in *Miles*, the Court first addressed the scope of damages recoverable in a wrongful death action brought under the general maritime law in *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974). The decedent in *Gaudet* was a longshoreman who was killed while working in state territorial waters.[1] In *Gaudet*, the Court held, *inter alia*, that a dependent plaintiff, the decedent's wife, could recover for her loss of society in a maritime wrongful death action.

Four years later, in *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978), the Court considered the scope of recovery under the Death on the High Seas Act (DOHSA), 46 U.S.C.App. § 761 *et seq.* In declining to award loss of society damages to Higginbotham's widow, the Court limited its holding in *Gaudet* to deaths occurring in territorial waters. In *Higginbotham*, the Court concluded that, where the death occurred on the high seas, a dependent could not recover loss of society because the DOHSA specifically limited recoverable damages to pecuniary losses. The Court refused to supplement the DOHSA damages because Congress had specified the scope of damages in the act.

Nevertheless, in *Alvez*, a plurality of the Supreme Court, relying on *Gaudet*, held that an *injured* harbor worker's wife could recover loss of society damages under the general maritime law. The Court concluded that "[w]ithin this single body of judge-formulated law [i.e., general maritime law], there is no apparent reason to dif-

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[1] As we will discuss in more detail later, unlike Gaudet, who was a longshoreman, the decedent in *Miles* and Mr. Murray, in today's case, were seamen.

ferentiate between fatal and nonfatal injuries in authorizing recovery of damages for loss of society." *Alvez*, 446 U.S. at 281, 100 S.Ct. at 1677.

In *Cruz*, this court was faced with the spouse of an *injured* seaman seeking to recover loss of society damages under the general maritime law. We had to decide whether Cruz's occupation as a seaman required us to deny loss of society damages to his wife even though the harbor worker's wife in *Alvez* could recover those damages. We allowed the wife to recover loss of society. See *Cruz*, 638 F.2d at 725. We found "no more reason to distinguish between the types of workers whose rights stem from the same integral jurisprudence" than the *Alvez* court found to differentiate between degrees of injury. *Id.* at 724.

The Murrays rely on *Alvez* and *Cruz* and argue that *Miles* has not altered them. We disagree. First, *Miles* removed the judicial underpinning of *Alvez* and *Cruz*, on which the Murrays' argument rests. *Miles* specifically limited *Gaudet*—the starting point for *Alvez* and *Cruz*—to its facts. The Court found that the "holding of *Gaudet* applies only in territorial waters, and it applies only to longshoremen." *Miles*, ____ U.S. at ____, 111 S.Ct. at 325, 112 L.Ed.2d at 290. Consequently, *Miles* must have, at least implicitly, placed the same restriction on *Alvez* because that opinion merely extended *Gaudet* to personal injury actions. In fact, Justice Powell, who cast the deciding vote in *Alvez*, wrote that he "continue[d] to believe that [*Gaudet*] was decided wrongly, but [I] recognize[d] the utility of stare decisis in cases of this kind." *Alvez*, 446 U.S. at 286, 100 S.Ct. at 1680 (Powell, J., concurring).

Moveover, our decision in *Cruz* relied on an expansive reading of both *Gaudet* and *Alvez* in holding that an injured seaman's spouse could recover for her loss of socie-

ty. *Miles's* holding that only survivors of longshoremen killed in territorial waters may recover nonpecuniary damages under *Gaudet* has foreclosed, however, such an expansive reading of these two opinions. Therefore, we find that *Miles* has so undercut *Cruz's* foundations as to overrule it or render its precedential value meaningless.

Second, *Miles* espoused a strong deference to Congress and federal maritime legislation. The Court declared that:

> We no longer live in an era when seamen and their loved ones must look primarily to the courts as a source of substantive legal protection from injury and death; Congress and the States have legislated extensively in these areas. In this era, an admiralty court should look primarily to these legislative enactments for policy guidance. We may supplement these statutory remedies where doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate, but we must also keep strictly within the limits imposed by Congress.

Miles, ____ U.S. at ____, 111 S.Ct. at 323, 112 L.Ed.2d at 287. We are required, therefore, to look to the Jones Act to consider the scope of the damage award for a seaman's injury.

In *Miles*, the Supreme Court considered the damage scheme Congress contemplated when it enacted the Jones Act. The Court recognized that while the Jones Act "evinces no general hostility to recovery under the maritime law," *id.* at ____, 111 S.Ct. at 324, 112 L.Ed.2d at 289, courts assume that "Congress is aware of existing law when it passes legislation." *Id.* at ____, 111 S.Ct. at 325, 112 L.Ed.2d at 291. When Congress enacted the Jones Act,

spouses of seamen had no general maritime right to recover for loss of society in unseaworthiness claims. *Stretton v. Penrod Drilling Co.*, 701 F.2d 441, 444 (5th Cir.1983); *Christofferson v. Halliburton Co.*, 534 F.2d 1147, 1149 (5th Cir.1976), *overruled in part by Cruz*, 638 F.2d at 725; *Branton v. Lennard Pipelines*, 1991 A.M.C. 1514, 1991 WL 40263 (E.D.La.1991). Cogress incorporated the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 *et seq.*, unaltered into the Jones Act with this presumed knowledge that no remedy existed for loss of society or other nonpecuniary damages. *Miles* concluded that Congress thereby demonstrated its intent to incorporate the FELA's pecuniary limitation on wrongful death damages into the Jones Act. *See Miles*, ____ U.S. at ____, S.Ct. at 325, 112 L.Ed.2d at 290-91. This reasoning applies with equal force to a seaman's claim for injuries. As a result, the Jones Act limits a seaman's recovery for injury to pecuniary losses and precludes any recovery for nonpecuniary losses, such as loss of society.

The Murrays ask us, therefore, to recognize damages that the general maritime law did not provide before the Jones Act's enactment and that the Jones Act itself did not sanction. We follow *Miles's* reasoning and decline, in this personal injury action, to upset the balance Congress has created in the Jones Act by allowing the recovery of damages Congress did not intend. "It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially-created cause of action in which liability is without fault than Congress has allowed in cases of [injury] resulting from negligence." *Id.* at ____, 111 S.Ct. at 325, 112 L.Ed.2d at 291.

The Murrays argue next that we should not read *Miles* as precluding a seaman injured in state waters from

recovering non-pecuniary losses. The Murrays point out the anomaly of allowing the harbor worker injured in inland waters to recover nonpecuniary losses but barring the same recovery by the seaman injured at the same location.

We acknowledge the anomaly. This anomaly results, however, from the Supreme Court's decision in *Miles* to limit *Gaudet* to its facts. *Miles* makes it clear that the widow of a seaman cannot recover loss of society whether the death occurs in territorial waters or on the high seas. The same result must follow in injury cases. It would make no sense to conclude that Congress intended one damage scheme for injuries occurring to seamen in state waters and another on the high seas. The Supreme Court's emphasis in *Miles* on the importance of uniformity in remedies in maritime death cases must apply equally to injury actions.

If we recognize Mrs. Murray's loss of society claim, we would create the very sort of anomaly *Miles* sought to avoid. Therefore, we follow the Supreme Court's lead in *Miles* and hold that the spouse of an injured seaman has no cause of action for loss of society under the general maritime law.[2]

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[2] In reaching this conclusion, we observe that since *Miles* a number of district courts have considered the application of *Miles* to general maritime injury actions. Almost every court that has decided this question has held, as we do today, that *Miles* precludes recovery for loss of society. *See, e.g., Duplantis v. Texaco, Inc.*, 771 F.Supp. 787 (E.D.La. 1991); *Dunbar v. American Commercial Barge Lines Co.*, 771 F.Supp. 151 (M.D.La.1991); *Branton*, 1991 A.M.C. 1514; *Breland v. Western Oceanic, Inc.*, 755 F.Supp. 718 (W.D.La.1991); *Anglada v. Tidewater, Inc.*, 752 F.Supp. 722 (E.D.La.1990). But see *Bourque v. Mallard Workover and Drilling Inc.*, No. 89-1502 (W.D.La. July 9, 1991) (not extending *Miles*); *Rayborn v. Zapata Offshore Co.*, No. 90-0467 (W.D.La. May 2, 1991) (same).

IV.

[3] The Murrays also contend that the district court erred in striking their children's claims for loss of society. Having already determined that an injured seaman's spouse has no claim for loss of society, we find no reason to treat a seaman's children differently. As we discuss above, *Miles* emphasized the need to develop a uniform maritime law. It would be anomalous, indeed, to allow an injured seaman's children to recover for the nonpecuniary loss of society but to refuse such recovery to the seaman's spouse.[3] See *Robertson v. Arco Oil and Gas Co.*, 766 F.Supp. 535, 539 (W.D.La.1991) (holding that, in light of *Miles's* limitation of *Gaudet*, a dependent of a longshoreman injured on the outer continental shelf could not recover under the general maritime law for loss of society), *aff'd on othe grounds*, 948 F.2d 132 (5th Cir.1991).

V.

[4] Finally, the Murrays argue that even if we conclude that *Miles* bars the recovery of Mrs. Murray and the children we should not apply *Miles* retroactively under the Supreme Court's test for retroactivity in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-107, 92 S.Ct. 349, 355-56, 30 L.Ed.2d 296 (1971). This court has recognized recently, however, that the Supreme Court's decision last term in *James B. Beam Distilling Co. v. Georgia*, ____ U.S. ____, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991) (*Jim Beam*), has significantly altered the retroactivity analysis. *See In re Luce*, ____ F.2d ____, ____ No. 91-1069, slip op. at 3427 (5th Cir. Mar. 9, 1992); *Sterling v. Block*, 953 F.2d 198, 200 (5th Cir.1992). In *Jim Beam*, the Supreme Court held that

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[3] Even in the absence of *Miles*, we would not recognize the children's claims. *See DeLoach v. Companhia de Navegacao Lloyd Brasileiro*, 782 F.2d 438 (3d Cir.1986); *Madore v. Ingram Tank Ships, Inc.*, 732 F.2d 475 (5th Cir.1984).

"when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata." *Jim Beam*, 111 S.Ct. at 2448.

Thus, the threshold question we face in determining whether to give *Miles* retroactive effect is whether the Supreme Court applied the rule it enunciated in *Miles* to the parties in that case. *See Sterling*, at 200. This court observed in *Sterling* that:

> In order to conclude that the rule was applied to the original parties, the earlier opinion need not explicitly address the retroactivity issue. Where the court does not explicitly decide the retroactivity question or reserve the question of whether its holding applies to the parties before it, "it is properly understood to have followed the normal rule of retroactive application in civil cases."

Id. (quoting *Jim Brown*, 111 S.Ct. at 2445).

In *Miles*, as we discuss above, the Supreme Court held that the general maritime action for wrongful death of a seaman does not include recovery for loss of society. *Miles*, ____ U.S. at ____, 111 S.Ct. at 328, 112 L.Ed.2d at 294. The Supreme Court, however, did not discuss the retroactivity of its decision or reserve that issue. Nevertheless, the Court affirmed the Fifth Circuit's denial of Mrs. Miles's recovery for loss of society. Consequently, we conclude that *Miles* "followed the normal rule of retroactive application in civil cases" and applied the new rule to the parties before it. *Jim Beam* dictates, therefore, that we apply *Miles* to the parties before us in this case.

For the above reasons, Mrs. Murray's award for loss of society should be stricken. The judgment of the district court is affirmed in all other respects. We remand this case to the district court for entry of judgment consistent with this opinion.

VACATED IN PART, AFFIRMED IN PART, AND REMANDED.